SUPREME COURT OF THE UNITED STATES

No. 98–1441

ERNEST C. ROE, WARDEN, PETITIONER *v.* LUCIO FLORES-ORTEGA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 23, 2000]

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, concurring in part and dissenting in part.

I join Part II–B of the Court's opinion, but I respectfully dissent from Part II–A. As the opinion says, the crucial question in this case is whether, after a criminal conviction, a lawyer has a duty to consult with her client about the choice to appeal. The majority's conclusion is sometimes; mine is, almost always in those cases in which a plea of guilty has not obviously waived any claims of error.[1] It is unreasonable for a lawyer with a client like

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[1] I say "almost" always, recognizing that there can be cases beyond the margin: if a legally trained defendant were convicted in an error-free trial of an open-and-shut case, his counsel presumably would not be deficient in failing to explain the options. This is not what we have here. Nor is this a case in which the judge during the plea colloquy so fully explains appeal rights and possible issues as to obviate counsel's need to do the same; such a possibility is never very likely and exists only at the furthest reach of theory, given a defendant's right to adversarial representation, see *Smith* v. *Robbins*, 528 U. S. ___, ___ (2000) (slip op., at 5–6) (SOUTER, J., dissenting). Finally, of course, there is no claim here that Flores-Ortega waived his right to appeal as part of his plea agreement; although he pleaded guilty, the record shows that he and the State argued before the trial court for different sentences, and he had little understanding of the legal system. The fact of the plea is thus irrelevant to the disposition of the case.

respondent Flores-Ortega to walk away from her representation after trial or after sentencing without at the very least acting affirmatively to ensure that the client understands the right to appeal.

Where appeal is available as a matter of right, a decision to seek or forgo review is for the convict himself, not his lawyer, *Jones* v. *Barnes,* 463 U. S. 745, 751 (1983), who owes a duty of effective assistance at the appellate stage, *Evitts* v. *Lucey,* 469 U. S. 387, 396 (1985); *Penson* v. *Ohio,* 488 U. S. 75, 85 (1988). It follows, as the majority notes, that if a defendant requests counsel to file an appeal, a lawyer who fails to do so is, without more, ineffective for constitutional purposes. But, as the Court says, a lesser infidelity than that may fail the test of lawyer competence under *Strickland* v. *Washington,* 466 U. S. 668 (1984), which governs this case. I think that the derelict character of counsel's performance in this case is clearer than the majority realizes.

In *Strickland*, we explicitly noted that a lawyer has a duty "to consult with the defendant on important decisions . . . in the course of the prosecution." *Id.*, at 688. The decision whether to appeal is one such decision. Since it cannot be made intelligently without appreciating the merits of possible grounds for seeking review, see *Peguero* v. *United States*, 526 U. S. 23, 30–31 (1999) (O'CONNOR, J., concurring); *Rodriquez* v. *United States,* 395 U. S. 327, 330 (1969), and the potential risks to the appealing defendant, a lay defendant needs help before deciding. If the crime is minor, the issues simple, and the defendant sophisticated, a 5-minute conversation with his lawyer may well suffice; if the charge is serious, the potential claims subtle, and a defendant uneducated, hours of counseling may be in order. But only in the extraordinary case will a defendant need no advice or counsel whatever.

To the extent that our attention has been directed to statements of "prevailing professional norms," *Strickland*

v. *Washington*, 466 U. S., at 688 (*Strickland*'s touchstone of reasonable representation, see *ibid.*), they are consistent with common sense in requiring a lawyer to consult with a client before the client makes his decision about appeal. Thus, ABA Standards for Criminal Justice 21–2.2(b) (2d ed. 1980):

> "Defense counsel should advise a defendant on the meaning of the court's judgment, of defendant's right to appeal, on the possible grounds for appeal, and of the probable outcome of appealing. Counsel should also advise of any posttrial proceedings that might be pursued before or concurrent with an appeal. While counsel should do what is needed to inform and advise defendant, the decision whether to appeal, like the decision whether to plead guilty, must be the defendant's own choice."

See also ABA Standards for Criminal Justice, Defense Function 4–8.2(a) (3d ed. 1993) (stating that trial counsel "should explain to the defendant the meaning and consequences of the court's judgment and defendant's right of appeal" and "should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal"); *id.*, 4–8.2, Commentary ("[C]ounsel [has the duty] to discuss frankly and objectively with the defendant the matters to be considered in deciding whether to appeal. . . . To make the defendant's ultimate choice a meaningful one, counsel's evaluation of the case must be communicated in a comprehensible manner. . . . [T]rial counsel should always consult promptly with the defendant after making a careful appraisal of the prospects of an appeal"); ABA Standards for Criminal Justice 21–3.2(b)(i).

So also the ABA Model Code of Professional Responsibility, EC 2–31 (1991), provides: "Trial counsel for a con-

victed defendant should continue to represent his client by advising whether to take an appeal . . . ." Likewise ABA Model Rule of Professional Conduct 1.3, Comment (1996): "[I]f a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter." Restatement (Third) of the Law Governing Lawyers §31(3) (Proposed Final Draft No. 1, Mar. 29, 1996) embodies the same standards: "A lawyer must notify a client of decisions to be made by the client . . . and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Indeed, California has apparently eliminated any option on a lawyer's part to fail to give advice on the appeal decision (whether the failure be negligent or intentional). California Penal Code Ann. §1240.1(a) (West Supp. 2000) provides that trial counsel has a duty to "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." California thus appears to have adopted as an unconditional affirmative obligation binding all criminal trial counsel the very standard of reasonable practice expressed through the Restatement and the ABA standards.

I understand that under *Strickland*, "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides," and that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U. S., at 688–689. But that qualification has no application here.

While *Strickland*'s disclaimer that no particular set of rules should be treated as dispositive respects the need to defer to reasonable "strategic choices" by lawyers, *id.*, at 690, no such strategic concerns arise in this case. Strategic choices are made about the extent of investigation, the risks of a defense requiring defendant's testimony and exposure to cross-examination, the possibility that placing personal background information before a jury will backfire, and so on. It is not, however, an issue of "strategy" to decide whether or not to give a defendant any advice before he loses the chance to appeal a conviction or sentence. The concern about too much judicial second-guessing after the fact is simply not raised by a claim that a lawyer should have counseled her client to make an intelligent decision to invoke or forgo the right of appeal or the opportunity to seek an appeal.

The Court's position is even less explicable when one considers the condition of the particular defendant claiming *Strickland* relief here. Flores-Ortega spoke no English and had no sophistication in the ways of the legal system. The Magistrate Judge found that "[i]t's clear . . . that Mr. Ortega had little or no understanding of what the process was, what the appeal process was, or what appeal meant." App. 133. To condition the duty of a lawyer to such a client on whether, *inter alia*, "a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal)," *ante*, at 8, is not only to substitute a harmless-error rule for a showing of reasonable professional conduct, but to employ a rule that simply ignores the reality that the constitutional norm must address.[2] Most criminal defendants, and certainly this

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[2]The Court holds that a duty to consult will also be present if "this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Ante*, at 8. Because for most defendants, and certainly for unsophisticated ones like Flores-Ortega who are unaware

one, will be utterly incapable of making rational judgments about appeal without guidance. They cannot possibly know what a rational decisionmaker must know unless they are given the benefit of a professional assessment of chances of success and risks of trying. And they will often (indeed, usually) be just as bad off if they seek relief on habeas after failing to take a direct appeal, having no right to counsel in state postconviction proceedings. See *Pennsylvania* v. *Finley,* 481 U. S. 551, 557 (1987); *Murray* v. *Giarratano,* 492 U. S. 1, 12 (1989); cf. *Peguero* v. *United States,* 526 U. S., at 30 (O'CONNOR, J., concurring) ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial 28 U. S. C. §2255 motion").

In effect, today's decision erodes the principle that a decision about appeal is validly made only by a defendant with a fair sense of what he is doing. Now the decision may be made inadvertently by a lawyer who never utters the word "appeal" in his client's hearing, so long as that client cannot later demonstrate (probably without counsel) that he unwittingly had "nonfrivolous grounds" for seeking review. This state of the law amounts to just such a breakdown of the adversary system that *Strickland* warned against. "In every case the court should be concerned with whether . . . the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." 466 U. S., at 696; see also *Rodriquez* v. *United States,* 395 U. S., at 330; *Penson* v. *Ohio,* 488 U. S., at 85.

I would hold that in the aftermath of the hearing at

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even of what an appeal means, such a demonstration will be a practical impossibility, I view the Court as virtually requiring the defendant to show the existence of some nonfrivolous appellate issue.

which Flores-Ortega was sentenced, his lawyer was obliged to consult with her client about the availability and prudence of an appeal, and that failure to do that violated *Strickland*'s standard of objective reasonableness. I therefore respectfully dissent from Part II–A of the majority's opinion.